Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1976

No. 76-1804

A.E. HOTCHNER,

Petitioner,

-against-

DOUBLEDAY & COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Questions Presented For Review 2

Constitutional Provision Involved 3

Statement of the Case 3

Reasons For Granting the Writ:

I. The Court of Appeals has decided an important question of federal law in a way conflicting with the applicable decisions of this Court and another Circuit Court of Appeals. 5

II. The verdict was more than adequately supported by clear and convincing proof that Doubleday published with reckless disregard of the truth. The Circuit Court not only overlooked or misapprehended that evidence but also, disregarding established principles of law, in effect tried the case *de novo,* relying on testimony of defendant's witnesses that obviously had been rejected by the jury and also on matter not known to Doubleday at the time of publication, and substituted its own view of the facts for that of the jury and trial court. .. 9

A. The verdict was more than adequately supported by clear and convincing proof that Doubleday published with reckless disregard of the truth. 10

Contents

Page

B. The Second Circuit not only overlooked or misapprehended that evidence but also, disregarding established principles of law, in effect tried the case *de novo,* relying on testimony of defendant's witnesses that obviously had been rejected by the jury and also on matter not known to Doubleday at the time of the publication, and substituted its own view of the facts for that of the jury and trial court. 17

III. The reversal by the Second Circuit was clearly in contravention of the Seventh Amendment. 27

Conclusion 28

TABLE OF CITATIONS

Cases Cited:

Arkwright Mutual Insurance Co. v. Philadelphia Electric Co., 427 F.2d 1273 (3rd Cir. 1970) 18, 27

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355 (1962) 9, 27, 28

Bennett v. Buchan, 76 N.Y. 386 (1879) 15

Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1966) 8

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3489 (1977) 10, 13, 20, 25

Contents

Page

Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976), rehear. and rehear. en banc denied (3/5/76) 10, 11, 13, 15, 16, 20, 23

Cheatham v. Wehle, 5 N.Y.2d 598, 186 N.Y.S.2d 606, 159 N.E.2d 166 (1959) 26

Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690 (1961) 6, 9

Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920) 15, 26

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 22, 24

Diapulse Corp. of America v. Birtcher Corp., 362 F.2d 736 (2d Cir. 1966), cert. dism., 385 U.S. 801 (1966) 7

Farr v. Newman, 18 A.D.2d 54, 238 N.Y.S.2d 204 (4th Dept. 1963), aff'd., 14 N.Y.2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369 (1964) 15

Garcia v. Murphy Pacific Salvaging Co., 476 F.2d 303 (5th Cir. 1973) 9

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 24

Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970), rehear. denied, 397 U.S. 978 (1970) 10, 15, 16, 19, 22, 24

Gonzales v. Missouri Pacific R.R. Co., 511 F.2d 629 (5th Cir. 1975) 27

Contents

Page

Guam Federation of Teachers Local 1581 AFL v. Ysrael, 492 F.2d 438 (9th Cir. 1974), cert. denied, 419 U.S. 872 (1974) 2, 5, 6, 20

Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1967), cert. denied, 391 U.S. 913 (1968) 17

Herbert v. Lando, (S.D.N.Y. 74 Civ. 434, 1/4/77 ___ F. Supp. ___) 26

Kapiloff v. Dunn, 27 Md. App. 514, 343 A.2d 251 (1975), cert. denied, 426 U.S. 907 (1976) 20

Lavender v. Kurn, 327 U.S. 645 (1946) 8, 18

Moore v. Guthrie Hospital, Inc., 403 F.2d 366 (4th Cir. 1968) 27

New York Times v. Sullivan, 376 U.S. 254 (1964) 2, 3, 5, 6, 7, 8, 9, 10, 17, 24

Powers v. Continental Casualty Co., 301 F.2d 386 (8th Cir. 1962) 18, 27

Sprouse v. Clay Communications Inc., 211 S.E.2d 674 (1975), cert. denied, 423 U.S. 882 (1975), rehear. denied, ibid., 991 (1975) 17

St. Amant v. Thompson, 390 U.S. 727 (1968) ...9, 10, 15, 16, 20

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944), rehear. denied, 322 U.S. 767 (1944) 18

Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29 (1944) 26

Contents

Page

Triggs v. Sun Printing and Publishing Association, 179 N.Y. 144, 71 N.E. 739 (1904) 24, 26

United States v. Massachusetts Bonding & Insurance Co., 303 F.2d 823 (2d Cir. 1962), cert. denied, sub nom., One Gustavsson Lumber Co., Inc. v. Browne & Bryan Lumber Co., Inc., 371 U.S. 942 (1962), rehear. denied, 372 U.S. 932 (1973) 18

Varnish v. Best Medium Publishing Co., 405 F.2d 608 (2d Cir. 1968), cert. denied, 394 U.S. 987 (1969), rehear. denied, 394 U.S. 930 (1969) 11

Statute Cited:

28 U.S.C. Sec. 1254(1) 2

United States Constitution Cited:

First Amendment 5, 6, 8, 24

Seventh Amendment 3, 27

APPENDIX

Opinion of the Court of Appeals 1a

Memorandum Opinion of the District Court 10a

In The

Supreme Court of the United States

October Term 1976

No. 76-

A.E. HOTCHNER,

Petitioner,

vs.

DOUBLEDAY & COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner A.E. Hotchner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit herein, reversing a judgment of the District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals (Lumbard, Cir. J.) is reported at 551 F.2d 910, and appears in the Appendix to this petition at 1a.[1] The memorandum opinion of the District Court

1. Issuance of mandate to and including June 21, 1977, pending this application for certiorari, was stayed by order of the Court of Appeals dated May 19, 1977.

(Brieant, D.J.) is not reported. It appears in the appendix at 10a. An earlier opinion of the District Court, denying the motion of respondent Doubleday for summary judgment, was reported at 404 F. Supp. 1041.

JURISDICTION

Judgment of the Court of Appeals was entered on March 23, 1977. A timely petition for rehearing with a suggestion for rehearing *en banc* filed by petitioner was denied on May 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. (a) Have *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and subsequent cases, changed not only the *standard* under which the evidence in a libel or invasion of privacy case must be examined, but also the *manner* in which the evidence is to be examined in the determination of whether or not a plaintiff has adduced the proof entitling him to go to the jury? In other words, do those cases nullify the general principles that, *inter alia,* evidence must be viewed in the light most favorable to the appellee and that the jury verdict must be upheld if supported by adequate evidence?

(b) Is not the decision of the Second Circuit Court of Appeals in direct conflict with the decision of the Ninth Circuit [*Guam Federation of Teachers Local 1581 AFL v. Ysrael,* 492 F.2d 438 (9th Cir. 1974), *cert. denied,* 419 U.S. 872 (1974)] on that point?

2. Did the Court of Appeals not only overlook or misapprehend clear and convincing proof that respondent Doubleday published with reckless disregard of the truth, but also, in violation of established principles of law, in effect try the case *de novo,* relying on testimony of defendant's witnesses that obviously had been rejected by the jury as well as on testimony as to matters not known to Doubleday at the time of

publication, and substitute the appellate court's own view of the facts for that of the jury and trial court?

3. Did not the decision of the Court of Appeals deprive the petitioner of his right to a jury trial on the factual issues under the Seventh Amendment?

4. (a) Is not the decision of the Second Circuit an unauthorized and unwarranted extension of the *New York Times* rule? As a matter of law may a publisher, on notice of his author's bitter hatred of the plaintiff and the libelous nature of the material involving an attack on the personal characteristics of the plaintiff, nevertheless publish without investigation?

(b) Did not the Second Circuit err in disallowing such evidence to be considered by the jury on the issue of "reckless disregard"?

CONSTITUTIONAL PROVISION INVOLVED

Amendment VII — Civil Trials:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

Petitioner, intimate friend of Ernest Hemingway and author of, *inter alia,* the highly successful "Papa Hemingway", a memoir of their friendship, brought an action for libel and violation of his rights of privacy under the New York Civil Rights Law Sec. 51. The offensive matter (described by the Court of Appeals at Appendix, 4a) was contained in the "Hemingway in Spain" ("Book") published by respondent in 1974, which was an English translation of the work originally published in Spanish in 1967,

written by Jose Castillo-Puche.[2] The trial court held that "for purposes of this litigation, plaintiff Hotchner has achieved the status of a public figure." 404 F. Supp. 1041, 1047.

After a five-day trial, the jury returned a verdict for petitioner on both claims pleaded in the total amount of $125,002. A motion by Doubleday for judgment n.o.v. or in the alternative, for a new trial on general grounds and also excessiveness, was denied by the trial court. The Court of Appeals reversed solely on the ground that, although:

> "In this case, the jury could reasonably have found that, contrary to the impression of intimacy conveyed by his book, Castillo-Puche's actual contact with, and first-hand knowledge about Hotchner was virtually nil . . . [and] . . . Castillo-Puche's denunciations of Hotchner were sufficient to put Doubleday on notice of Castillo-Puche's animosity toward Hotchner (Appendix, 7a), . . . there was no evidence on which the jury might reasonably have found that the defendant Doubleday published the alleged libels with knowledge or reckless disregard for the truth" (*Ibid.*, 9a).

There was no criticism whatsoever of the action of the trial court and no finding or intimation of error with respect to the conduct of the trial, the charge, the admission or barring of evidentiary matter, or the trial court's rulings on the several pre-trial motions. Also, the Court of Appeals did not question that the offensive matter and conduct for which the jury awarded damages were otherwise actionable.

Petitioner maintains (a) that the verdict was more than adequately supported by clear and convincing proof that

2. On application of the Spanish Consul, the suit against the author, a Spanish citizen and resident, was dismissed without prejudice for want of personal jurisdiction over that defendant (Appendix, 16a).

Doubleday published with reckless disregard of the truth;[3] (b) the Court of Appeals not only overlooked or misapprehended that evidence, but also, in disregard of established principles of law, in effect tried the case *de novo,* relying on testimony of defendant's witnesses that obviously had been rejected by the jury and also on matter not known to Doubleday at the time of the publication, and substituted its own view of the facts for that of the jury and of the trial court which had denied Doubleday's motion for judgment n.o.v. or for a new trial.

It is respectfully submitted that such decision of the Second Circuit (1) extends the rule of *New York Times v. Sullivan* far beyond the subsequent decisions of this Court; (2) directly conflicts with the holding of the Ninth Circuit in *Guam Federation of Teachers Local 1581 AFL v. Ysrael, supra;* (3) departs from the basic law governing the functions of an appellate court; and (4) has deprived plaintiff of his rights under the Seventh Amendment.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY CONFLICTING WITH THE APPLICABLE DECISIONS OF THIS COURT AND ANOTHER CIRCUIT COURT OF APPEALS.

This appears to be the first First Amendment case where the appellate court overturned a jury's finding of "reckless disregard" in a special verdict and the trial court's refusal to set aside that verdict.

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3. To avoid repetition, we will summarize that evidence in our discussion under the Reasons for Granting the Writ, *infra,* II, pp. 9-17.

The Second Circuit proceeded on the basis that:

> "To ensure that proper weight has been given to the protection of First Amendment rights, it is important that the Court make 'an independent examination of the whole record' in scrutinizing the jury finding of scienter in a libel case." (Appendix, 6a).

We submit that any duty to re-examine the evidentiary basis of the lower court decision does not nullify the general principles that, as set forth in *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 696 (1961), on appeal the "Court of Appeals was, of course, bound to view the evidence in the light most favorable" to the appellee "and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn," and that insofar as factual issues are concerned, the verdict for plaintiff is to receive "the advantage of every fair and reasonable intendment that the evidence can justify."

In short, the additional burden of proof, imposed upon a First Amendment plaintiff by *New York Times v. Sullivan* and subsequent cases, has not changed the way the findings below are to be considered.

Reviewing those cases, another Court of Appeals aptly said in *Guam Federation of Teachers Local 1581 AFT v. Ysrael*, 492 F.2d 438 (9th Cir. 1974), *cert. denied*, 419 U.S. 872 (1974), at 441:

> "We think that in a libel case, as in other cases, the party against whom . . . a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can

> properly be drawn in his favor by the trier of the facts. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.
>
> "The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be examined is the same as in all other cases in which it is claimed that a case should not go to the jury." (emphasis by the court).

Nevertheless, the Court of Appeals for the Second Circuit in the instant case substituted its own view of the evidence in place of the jury's findings (in a special verdict) of "reckless disregard" as fully and properly defined by the trial court in its charge,[4] and, indeed, in overturning the jury's findings, took into consideration testimony as to matter not known to the publisher at the time of publishing the defamatory matter.

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4. This, although it had said in *Diapulse Corp. of America v. Birtcher Corp.*, 362 F.2d 736, 743 (2d Cir. 1966), *cert. dism.*, 385 U.S. 801 (1966), in upholding the verdict in that post-*New York Times* libel case:

> "'Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury.' [citations]. When reviewing the refusal of a judge to grant a directed verdict we must view the evidence and all inferences which reasonably flow from it most favorably to the party against whom the motion was directed. [citations]."

Petitioner does not and did not ever argue that it was not required to meet the *New York Times* standard, *i.e.*, demonstrate by "clear and convincing proof" that defendant Doubleday published with "reckless disregard as to the truth or falsity." We do maintain that an appellate court, even in First Amendment cases, is not authorized to substitute its own view of the evidence in place of the jury's findings of "reckless disregard" as properly defined by the trial court in its charge. The words of the Court in *Lavender v. Kurn*, 327 U.S. 645, 653 (1946), as well as these in the *Continental Ore* decision above quoted, are as applicable to the consideration of a First Amendment case as any other jury verdict:

> "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (emphasis supplied).[5]

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5. See also *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 536 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966), reinstating the jury verdict based on the issue of wilful misconduct (in a Warsaw Convention case).

The Court of Appeals cannot redetermine facts found by the jury. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines Ltd.*, 369 U.S. 355, 359 (1962); *Garcia v. Murphy Pacific Marine Salvaging Co.*, 476 F.2d 303, 306 (5th Cir. 1973), and many others. But this, we submit, is what the Second Circuit did in the case at bar. We respectfully suggest that, after a review of the facts as set forth in Reason II, *infra*, the Court could well repeat the words of Mr. Justice White in *Continental Ore Co. v. Union Carbide & Carbon Corp., supra*, 370 U.S. at 696-7:

> "From our examination of the rather extensive record we have concluded that the Court of Appeals departed from this rule and erred in holding that there was insufficient evidence to support [the] finding. . . ."

II.

THE VERDICT WAS MORE THAN ADEQUATELY SUPPORTED BY CLEAR AND CONVINCING PROOF THAT DOUBLEDAY PUBLISHED WITH RECKLESS DISREGARD OF THE TRUTH. THE CIRCUIT COURT NOT ONLY OVERLOOKED OR MISAPPREHENDED THAT EVIDENCE BUT ALSO, DISREGARDING ESTABLISHED PRINCIPLES OF LAW, IN EFFECT TRIED THE CASE *DE NOVO*, RELYING ON TESTIMONY OF DEFENDANT'S WITNESSES THAT OBVIOUSLY HAD BEEN REJECTED BY THE JURY AND ALSO ON MATTER NOT KNOWN TO DOUBLEDAY AT THE TIME OF PUBLICATION, AND SUBSTITUTED ITS OWN VIEW OF THE FACTS FOR THAT OF THE JURY AND TRIAL COURT.

The determination as to whether Doubleday published the book with the "actual malice", *i.e.*, reckless disregard, required by *New York Times v. Sullivan*, was for the jury as the finder of fact. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). Even in

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied,* 45 U.S.L.W. 3489 (1977), a non-jury case, the Second Circuit stated at p. 896:

> "The findings were that Littell's statement that Buckley engaged in libelous journalism was made with knowledge of its falsity or in reckless disregard of its truth or falsity, and *this is a finding based in part upon credibility and demeanor which we cannot go behind."* (emphasis supplied).

The record substantiates that plaintiff unquestionably *did* adduce "clear and convincing proof" so as to make a *prima facie* case under the *New York Times* rule. Accordingly, the Circuit Court was not entitled to disregard the jury verdict and in effect try the case *de novo.*

A. The verdict was more than adequately supported by clear and convincing proof that Doubleday published with reckless disregard of the truth.

While "'reckless disregard', it is true, cannot be fully encompassed in one infallible definition" (*St. Amant v. Thompson, supra,* 390 U.S. at 730), if defendant entertained serious doubts as to the truth of his publication, "publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice." *Ibid.,* 731.

Recklessness on the part of Doubleday may be found if there were "obvious reasons" to doubt the veracity of Puche or the accuracy of his reports. *Ibid.,* 732; *Goldwater v. Ginzburg,* 414 F.2d 324, 337 (2d Cir. 1969); *cert. denied,* 396 U.S. 1049 (1970), *rehearing denied,* 397 U.S. 978 (1970); *Carson v. Allied News Co.,* 529 F.2d 206, 209 (7th Cir. 1976), *rehearing and rehearing en banc denied* (3/5/76).

If, for example, knowing that there was a high probability that Puche's statements about Hotchner might be false, Doubleday took a calculated risk and published the matter anyway, that would be an example of "reckless disregard." *Varnish v. Best Medium Publishing Co.*, 405 F.2d 608, 612 (2d Cir. 1968), *cert. denied*, 394 U.S. 987 (1969), *rehearing denied*, 394 U.S. 930 (1969); *Carson v. Allied News Co., supra*, 529 F.2d at 213.

As Judge Brieant said regarding that proof of liability in his memorandum denying Doubleday's motion for judgment n.o.v. or a new trial:

> "[W]e think the proof more than adequate to support the detailed and carefully considered special findings of our attentive and diligent jury. Our jury could and did find, as to those of Hotchner's claims which it found actionable, that clear and convincing evidence showed Doubleday published with reckless disregard for their truth or falsity. Indeed, for the most part this clear and convincing evidence is documentary and comes from Doubleday's files, or was in possession of persons whose knowledge the jury could reasonably impute to Doubleday." Appendix, p. 11a.

That evidence included the following:

A year before publication, Doubleday's employees had serious doubts about the references to Hotchner in the Book. On July 13, 1973, editor Medina sent a memorandum (Exh. 7, 212a)[6] to the Manager of Doubleday's Contracts Department,

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6. "a" indicates page of Appendix on Appeal to the Circuit Court, "t" refers to pages of the Trial Record.

enclosing eight pages (Exhs. 5A-G, 203-210a) of Helen Lane's translation relating to Hotchner, asking him for his opinion as to whether what she termed the "bitchy" and "side-swiping" matter should be left in. In addition to many of the words the jury found libelous, those eight pages contained phrases from the Spanish Work which showed Puche's bitter hatred of Hotchner. Exh. 5D (206a) purports Hemingway saying about Hotchner "he's dirty and a terrible ass-licker. . . . I wouldn't sleep in the same room with him,"[7] and Exh. 5E (208a) purports Hemingway saying of Hotchner "he's never done me dirt, but he's the sort of person you have to keep your eye on every minute."

The reply memorandum (Exh. 9), of young William Austin, the Assistant Contracts Manager of Doubleday, who was not a lawyer, urged that these references to Hotchner be "toned down or eliminated" by Medina, and concluded:

> "When looked at together *these statements certainly ridicule Hotchner and impugn his reputation and character.* As he seems to be an author who has worked in movies and TV, *this could be a serious matter.*
>
> *To make matters worse I doubt whether any of these statements can be substantiated in any way.*
>
> From reading the pages you sent, this treatment *borders on 'malice', which together with 'reckless*

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7. There are two obvious inferences from this quotation, both libellous. Either Hotchner would steal his valuables or would make homosexual advances. The latter inference is intended by Puche for on p. 82 of the Book, he quotes Hemingway: "I don't trust anyone . . . I did once and the guy tried to hop in bed with me," as part of a conversation explicitly dealing with Hotchner.

> *disregard for the truth,' is a prime element in any libel action . . . .*" (emphasis added) (214a).[8]

This alone was sufficient to impose a duty of inquiry upon Doubleday, if not *per se* to substantiate the finding of reckless disregard. *Cf.* the Court's comment in *Buckley v. Littell, supra,* 539 F.2d at 896:

> "Furthermore, Littell's publisher was very concerned about the paragraph in which the Pegler reference occurs, although not specifically about the sentence here found to be libelous; this concern should have been a red flag to Littell."

So, in *Carson v. Allied News Co., supra,* 529 F.2d at 211, the Court noted:

> "They were also aware as publishers that the substance of the defamatory statements they were publishing made 'substantial danger to reputation apparent' [citations]."

Fully aware of Puche's hatred toward Hotchner, his reckless disregard for the truth, and the problems involved in this publication, Medina wrote to Puche on August 6, 1973 (Exh. 11) regarding:

> ". . . the possibility of libel to Hotchner in the book. You are certainly entitled to your opinion

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8. More than one year prior to the Austin memorandum, Medina had been put on notice by a letter from Lane (Exh. 17), as to the general unreliability of Puche's Book:

> "Moreover I discovered that a large number of Castillo-Puche's comments about the episodes in Hemingway's novels contain *gross errors of fact* . . . Groan! . . . Groan!" (227a). (emphasis added).

> of Hotchner, and you may very well be right — it seems to our lawyers[9] that it would be a good idea if we would tone down some of your remarks about him, on the off chance that he could possibly bring suit against you. The fact that he is an American *author with quite a reputation,*[10] and also I seem to recall a professor, it's possible that he would think *some of your remarks border on 'malice' (in the legal sense) and that it would be professionally damaging to him, which in a legal sense could come under the legal grounds 'damaging to his reputation and character'. . . .*" (emphasis added). (217a).

In addition to the foregoing documentary evidence and admissions, plaintiff introduced further evidence from which the jury could infer Doubleday's knowledge of Puche's unreasoning hatred of Hotchner and the suspicion of falsity which must necessarily be aroused.

The testimony of Professor Purczinski (259-268a) and his translations in a comparative table with the Lane translation (where available) and the Book (Exh. 30, 230a *et seq.*) shows the unbridled attacks on Hotchner personally in the original Spanish book. Exh. 30 reveals Puche saying of Hotchner: "his role of shit-licker of the old colossus was so ostentatious that it almost made you want to vomit" (230a), "that his [Hotchner's] gaze which was a cross between a voluptuous cornered animal, a lynx with a 'quiqui'" (Spanish slang for holdup man) (233a), "what he [Hotchner] looked most like was the leader of one of

9. The statement attributed to "our lawyers" was a Medina fabrication, for no lawyer saw the Book prior to publication (253t). The fact that, despite the serious doubts of Medina and Austin, legal counsel was never consulted is also evidence of recklessness under the circumstances.

10. Recognition of Hotchner's prominence and nevertheless not checking into the facts is further evidence of recklessness.

the New York or Chicago gangs" (233a), and "Hotchner, with mocking face of the congenial gutter-rat" (234a).[11]

Obviously, in translating the Puche book from Spanish to English, Doubleday's agent Lane acquired knowledge of that irrational vicious hatred, and, as said in Judge Brieant's Memorandum, that "knowledge the jury could reasonably impute to Doubleday." (Appendix, p. 11a).

The bald and inescapable fact is that Doubleday published with "serious doubts" *after* acquiring knowledge of its author's bitter hatred of Hotchner, *i.e.*, "with obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson, supra,* 390 U.S. at 732; *Carson v. Allied News Co., supra,* 529 F.2d at 213-4, and *without making the slightest effort to verify the facts despite its knowledge of that virulent animosity.*[12]

While it may be that, as the Circuit Court said herein at Appendix, p. 6a, "mere negligence is not actionable," it is certainly true that evidence of negligence may be considered for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. *Goldwater v. Ginzburg, supra,* 414 F.2d at 342. That Court continued at p. 343:

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11. *Cf.* those scurrilous descriptions with Hemingway's own reference to Hotchner's "rugged honest face" in the "*Life* Articles" (Exh. 29-C); see *infra,* p. 21.

12. The rule that a principal is bound by knowledge of his agent as to all matters within the scope of agency, applies as well to material facts which the agent would have discovered had [s]he inquired, *i.e.*, what [s]he *should* have known. See *Bennett v. Buchan,* 76 N.Y. 386, 390-391 (1879); *Corrigan v. Bobbs-Merrill Co.,* 228 N.Y. 58, 71-72, 126 N.E. 260, 265 (1920); *Farr v. Newman,* 18 A.D. 2d 54, 58-59, 238 N.Y.S.2d 204, 208-209 (4th Dept. 1963), *aff'd.,* 14 N.Y.2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369 (1964).

> "As already stated, supra, *Times* does not hold that evidence of recklessness is inadmissible. . . . Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact, certainly a situation not intended by the Supreme Court." (citing *St. Amant v. Thompson, supra,* at 732-733).

Furthermore, in reviewing the evidence adduced by plaintiff, while the Circuit Court mentions the elimination or toning down by Doubleday's editor of "very uncomplimentary references to Hotchner" in the translation from the Spanish edition (Appendix, p. 3a), it ignores Medina's letter to Puche dated August 6, 1973, in which she recognized Puche's intention "to get at Hotchner, one way or the other, very strongly," and sought to console him by assurances that even after the bowdlerization, "*I* [*i.e.,* Doubleday's editor] certainly won't make Hotchner look marvelous."

Certainly Doubleday had reason to "seriously doubt" the scandalous accusations, especially where the libel warning from its employee Austin recognized Hotchner as a man of stature and Medina knew him as an intimate and biographer of Hemingway whom, as she said in a letter to Hotchner before publication, had written "such a wonderful book about Hemingway" (Exh. 22).

Under the circumstances Puche's attacks were so "inherently improbable" that to rely solely on his words did not release Doubleday from responsibility. *Goldwater v. Ginzburg, supra,* 414 F.2d at 337; *Carson v. Allied News Co., supra,* 529 F.2d at 213.

Unquestionably, the foregoing constitutes a prima facie case under the *New York Times v. Sullivan* rule.

As stated in *Sprouse v. Clay Communications Inc.*, 211 S.E. 2d 674, 689-90 (1975), *cert. denied,* 423 U.S. 882 (1975), *rehearing denied, ibid.* 991 (1975):

> "Each case must be considered by an appellate court on its facts with a strong sympathy toward protection of the robust political discussion contemplated by the First Amendment. At some point, however, cumulative evidence will show that the line of protection is breached and a jury must be permitted to find malice. . . ."

B. The Second Circuit not only overlooked or misapprehended that evidence but also, disregarding established principles of law, in effect tried the case *de novo,* relying on testimony of defendant's witnesses that obviously had been rejected by the jury and also on matter not known to Doubleday at the time of the publication, and substituted its own view of the facts for that of the jury and trial court.

Going beyond the examination of the prima facie evidence adduced by plaintiff-appellee, the Circuit Court relied on the testimony of appellant Doubleday's witnesses to overturn the reasoned special verdict of the jury and the decision of the trial court which had denied Doubleday's motion to set it aside. This clearly was improper:

> "Moreover, only the evidence and the reasonable inferences which support Appellee's theory may be considered. *Wilkerson v. McCarthy,* 1949, 336 U.S. 53; *Berry v. United States,* 1941, 312 U.S. 450." *Helene Curtis Industries Inc. v. Pruitt,* 385 F.2d 841, 850 (5th Cir. 1967); *cert. denied,* 391 U.S. 913 (1968).

Furthermore, that utilization of the testimony of Doubleday's witnesses was improper in several additional respects:

(a) The function of the appellate court was to determine whether there was sufficient evidence adduced by plaintiff-appellee to justify the jury's finding of knowing falsity or reckless disregard; it was not empowered to reevalue that evidence from its own remote viewpoint. Indeed, the jury had the right to disbelieve the testimony of every one of Doubleday's employees and other *ex post facto* witnesses especially Mary Hemingway, Valerie Hemingway and Alfred Rice, especially in view of their admissions, equivocations and fending with opposing counsel on the devastating cross-examinations.[13] See *e.g., Lavender v. Kurn,* 327 U.S. at 653, quoted *supra,* p. 8. This is so even if their testimony had been totally uncontradicted. *Powers v. Continental Casualty Co.,* 301 F.2d 386 (8th Cir. 1962); *Arkwright Mutual Insurance Co. v. Philadelphia Electric Co.,* 427 F.2d 1273, 1275 (3rd Cir. 1970); *cf. United States v. Massachusetts Bonding & Insurance Co.,* 303 F.2d 823, 827 (2nd Cir. 1962), *cert. denied sub nom., One Gustavsson Contracting Co., Inc. v. Browne & Bryan Lumber Co., Inc.,* 371 U.S. 942 (1962), *rehearing denied,* 372 U.S. 932 (1973). Mr. Justice Jackson stated in *Sartor v. Arkansas Natural Gas Corp.,* 321 U.S. 620, 628 (1944), *rehearing denied,* 322 U.S. 767 (1944):

> "This Court has said: 'The jury were the judges of the credibility of the witnesses . . . and in weighing their testimony had the right to determine how much dependence was to be

13. In denying Doubleday's motion for judgment n.o.v. etc., the trial court noted: "On several occasions its [Doubleday's] efforts to do so ["hotly contest" Hotchner's proof of falsity] led it to sponsor evidence or witnesses such as Valerie and Mary Hemingway which was counter-productive." (Appendix, 13a).

> placed upon it. . . . That part of every case, such as the one at bar, belongs to the jury, . . . and so long as we have jury trials, they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function.'"

(b) The testimony of Sister de Mola, who wrote her Ph.D. thesis on the *fictional* work of Castillo-Puche (593t), that he was an "important novelist," and Carrascal's testimony that Castillo-Puche was "one of the most important reporters in Spain" (Appendix, 3a) underlines the erroneous approach of the Court of Appeals inasmuch as such testimony was adduced for the first time at the trial and was not known to Doubleday at the time of publication when the cause of action arose.[14] *Cf. Goldwater v. Ginzburg, supra,* 414 F.2d at 344.

(c) Referring to the libellous comments about Hotchner's untrustworthiness, the Circuit Court said (Appendix, 8a):

> "As originally translated, Hemingway's words were: '[Hotchner is]dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him.' . . . as all the witnesses at trial agreed, the language used and sentiments expressed were not uncharacteristic of Hemingway."

Such statement is indeed contrary to the record not only to the testimony of Hotchner (289-290a) and Annie Davis (323a, 273t), Mary Schoonmaker (335-337a, 340a), but even that of Mary Hemingway, Doubleday's witness, who admitted she had never

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14. Sister de Mola testified she first spoke to Doubleday long after publication of the offensive Book, and Carrascal said his first communication with Doubleday was four weeks before the trial.

heard Hemingway make a derogatory remark to Puche or anybody else about Hotchner (509, 534-535t), and stated that she had never heard her husband to be coarse or crude (575t). Mrs. Hemingway on redirect testified that prior to Hotchner publishing *Papa Hemingway*, she felt he was a very good and close friend of Hemingway (469t) and Valerie Hemingway, also a Doubleday witness, admitted on cross-examination that Hemingway regarded Hotchner as a close friend (425t).

By its decision herein, the Second Circuit has literally authorized and approved a novel rule that to our knowledge has no reported precedent — *viz.*, that a publisher, knowing of an author's virulent hatred of the plaintiff and warned by its own employee of the possibility of a libel suit and that it was doubtful that the truth of the scurrious statements could be substantiated "in any way", may nevertheless publish with impunity that defamatory matter without making the *slightest* effort to verify or even consulting its own lawyers. If defendant-appellant's conduct was not "reckless disregard" then that term is for all practical purposes rendered meaningless by this decision.[15]

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15. The court conceded that Doubleday was "on notice of Castillo-Puche's animosity toward Hotchner" (Appendix, 7a), but apparently overlooked the rule that a mere assertion by a defendant that it believed the matter published by it to be true does not insure against liability, nor does a mere denial that it did not bear plaintiff personal ill-will or an allegation that the publication was made in good faith [incredible in the light of Doubleday's knowledge of its author's bitter hatred of Hotchner]. *St. Amant v. Thompson, supra*, 390 U.S. at 732; *Carson v. Allied News Co., supra*, 529 F.2d at 213-4; *Guam Federation of Teachers, Local 1581 AFL v. Ysrael, supra*, 492 F.2d at 439. Even the court in *Kapiloff v. Dunn*, the Maryland appeals case cited by the Second Circuit herein, acknowledged omission to investigate as a factor, saying at 269:

> "Although failure to check source material with experts may be one instance in a pattern of conduct showing complete disregard for the truth [citing *Butts* and *Goldwater*], we find no such pattern in the instant case."

See also the quotations from *Buckley v. Littell* and *Carson v. Allied News*, at p. 13, *supra*.

The Circuit Court says that "Doubleday's failure to conduct an *elaborate* independent investigation did not constitute reckless disregard of the truth"; and that "Doubleday could have inferred that Hemingway had affection and respect for Hotchner, but no means were *readily available* for verifying or discrediting Castillo-Puche's account" (Appendix, 8a; emphasis supplied). Respectfully, those statements are in complete disregard of the facts.

Doubleday already had "serious doubts" solidified by Austin's report (pp. 12-13, *supra*), *yet made absolutely no investigation whatever.* Editor Medina did all the abortive "toning-down" without help except from young non-lawyer Austin (252t); no one at Doubleday other than a copy editor read the entire translation (252t); Medina never questioned Puche's vicious remarks about Hotchner in the Spanish Work (253t), nor mentioned Hotchner to Lane (197a); no one at Doubleday read *Papa Hemingway,* much less compared it to either the translation or the galleys of the Book (257t) [if they had they would have found Hotchner lists those present in Pamplona and elsewhere in Spain the summer of 1959 (Exh. 28, pp. 234-5), and there is no mention of Castillo-Puche]; there was no consideration given by Medina or Doubleday of sending translations or galley proofs to any of the people mentioned by Puche as being friends and associates of Hemingway (255t); and no consideration given to showing the translation or galleys to Hotchner (256t) — or even asking him if he knew Puche — even though Medina wrote to Hotchner on March 13, 1973 (Exh. 22), requesting him to help in getting for Doubleday copies of Hemingway's three articles entitled "The Dangerous Summer" in *Life* Magazine (the "Life Articles") (229a), which articles also list the people at Pamplona — again no mention of Puche.[16]

16. The "*Life* Articles" certainly put Mrs. Medina on notice of the high regard in which Hemingway held Hotchner (see Exh. 29B and C). Puche quotes the Life Articles throughout the Book.

The most rudimentary of investigations would have uncovered information such as induced the trial court to state (in denying Doubleday's motion to dismiss at the close of the plaintiff's case)

> "I must say that some of this evidence would warrant a conclusion that this book is a total fake" (342a),

and, in the course of Doubleday's case, to say to counsel at the bench:

> "There is sufficient evidence in this record already to lead me to regard Puche as a liar . . ." (592t).

The major portion of the Book (that portion in which Hotchner is libelled) deals with the Festival in Pamplona in 1959. Published in 1974, it certainly was not "hot news". More than four years elapsed from the time Doubleday acquired the English rights to Puche's book to the time it published the Book. Obviously, the more time to investigate, the more the possibility of liability where defendant failed to properly do so. Thus it was said in *Goldwater v. Ginzburg, supra,* 414 F.2d at 339:

> "The Goldwater article did not contain 'hot news'; the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigation techniques; . . .."

Cf. *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967), at p. 157:

> "The evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored."

See also, *Carson v. Allied News Co., supra,* 529 F.2d at 211.[17]

The Second Circuit's decision also further diminishes the "reckless disregard" principle by introducing another novel concept, *i.e.*, "an assertion that cannot be proved false cannot be held libellous" (Appendix, p. 6a). "Incapability of independent verification" (*ibid.*, page 8a) not only opens the door wide but is indeed an *imprimatur* for unbounded libel by allowing a publisher to issue defamatory matter as the word of a dead man who is not available to denounce the lie. In the case at bar, while of course the deceased Hemingway could not testify, there was ample convincing indicia of unreliability available to Doubleday by simple references to his "LIFE" articles and inquiry to the readily available other Hemingway intimates such as Bill and Annie Davis referred to in the Puche Book and elsewhere, as well as comparison with Hotchner's *Papa Hemingway.*

Exception must also be taken to the Second Circuit's statement that "a writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be." (*ibid.*, pp. 6a-7a). The

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17. The Second Circuit said "Doubleday's editor did confirm with Castillo-Puche that he stood by his account of the incident" *(ibid.*, p. 8a), but her letter of August 6, 1973 (Exh. 11), is clear that she did not write for confirmation but merely for permission to delete the most scandalous matter, consoling him that even with the deletions and toning down "*I* certainly won't make Hotchner look marvelous" (emphasis supplied). Such language indicates not merely "reckless disregard" but actual participation and cooperation. Whether Puche's reply was more of a consent to lessening the possibility of a libel suit than a confirmation was again, a matter for the jury to decide.

governing New York law set forth in such leading cases as *Triggs v. Sun Printing & Publishing Association*, 179 N.Y. 144, 154-55, 71 N.E. 739, 742-3 (1904), is that the privilege of fair comment (criticism) is based on good faith and does not carry with it an unlimited license of vindictive unreasonable personal attack.[18] The First Amendment decisions have not rendered it inapplicable to this case:

> "The so-called privilege of fair comment is conditional and may be vitiated by proof of actual malice, i.e., knowing falsity or reckless disregard." *Curtis Publishing Co. v. Butts, supra,* 388 U.S. at fn. 152.

In *Goldwater v. Ginzburg, supra,* 414 F.2d at 341-2, it was held:

> "The *Times* decision changed state libel law only to the extent of requiring public officials to prove actual malice with convincing clarity. . . . The evidence submitted in *Sullivan* only showed the defendant newspaper had leveled an impersonal attack on certain government operations . . . the derogatory articles, statements and cartoons Fact published were leveled at Senator Goldwater personally."

New York Times v. Sullivan and subsequent decisions of this Court support free expression of honest ideas of political-sociological interest — they do not authorize vicious personal character attacks under the guise of opinion. Thus in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974) it is said:

> "But there is no constitutional value in false statements of fact. Neither the intentional lie nor

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18. As in the case at bar, plaintiff's appearance and conduct were attacked.

> the *careless error* materially advances society's interest in 'uninhibited, robust and wide-open debate on public issues'". (emphasis supplied).

In *Buckley v. Littell, supra,* while the Court revised a portion of a judgment based on an attack upon the political views of the plaintiff, it affirmed with respect to statements regarding his ability as a journalist, and declined to go behind the findings below of reckless disregard (see quotation *supra,* p. 10). The Court also said (pp. 896-897):

> "In short, whatever might be said of a person's political views, any journalist, commentator or analyst is entitled not to be lightly characterized as inaccurate and dishonest or libelous. We cannot disagree with the finding of the court below that it is 'crucial' to such a person's career that he or she not be so treated."[19]

In a nutshell, freedom of speech is to encourage circulation of ideas of social value — it is not intended to protect character assassination.

In the case at bar, all six passages found by the jury to be libellous and to have been published by Doubleday in reckless disregard of the truth reflected on personal qualities of Hotchner. They certainly are not an exposition on topics of "enormous public interest" such as "democracy against totalitarianism and about the continuation of the freedom of religious worship" referred to in *Buckley v. Littell, supra,* 539 F.2d at 889. They patently are a nasty personal attack on the man who is widely known as Hemingway's trusted confidante and advisor and one of his most intimate friends.

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19. There can be no question that the slurs in the Book of hypocrisy and untrustworthiness under the circumstances of the case at bar are libellous *per se* under New York law, and even Doubleday did not argue otherwise in its brief in the Circuit Court.

The matter of fair comment and bona fide opinion versus actionable personal attacks is a matter for the jury. See *e.g., Sun Publishing, supra; Cheatham v. Wehle,* 5 N.Y.2d 598, 615, 159 N.E.2d 166 (1959). So also in *Corrigan v. Bobbs-Merrill Co., supra,* 228 N.Y. at 71-72, with facts strikingly similar to here, it was held for the jury to find recklessness in the editor's indifference as to whether the "author's diatribes were intended as mere generalizations or as offensive personalities, and, if the latter, whether they were fair criticism or malicious falsehood."

* * *

Judge Haight recently said in *Herbert v. Lando* (S.D.N.Y. 74 Civ. 434, 1/4/77, ____ F. Supp. ____):

> "The concept of 'reckless disregard for truth' inevitably carries the trier of the facts into the thought processes of the defendant: the evaluation and balancing he made of conflicting information available to him; the misgivings he may have suppressed when deciding to publish." (p. 9 of typed opinion).

Surely a finding by a jury of "reckless disregard" upheld by the trial court is not to be overturned by an appellate court where, as here, there was clear and convincing evidence substantiating it. As this Court said in *Tennant v. Peoria & P.U. Ry. Co.,* 321 U.S. 29, 35 (1944):

> "It is not the function of a court to search the record for conflicting circumstantial evidence. . . . The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert

> instructions, and draws the ultimate conclusions as to the facts. . . . That conclusion . . . cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

III.

THE REVERSAL BY THE SECOND CIRCUIT WAS CLEARLY IN CONTRAVENTION OF THE SEVENTH AMENDMENT.

The facts found by the jury in this Hotchner case were not merely re-examined by the Second Circuit — they were redetermined.

The conduct of that Court as discussed at length in Reason II, *supra,* was clearly in violation of the Seventh Amendment to the Constitution of the United States. As this Court said in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., supra,* 369 U.S. at 358-359:

> "But neither we nor the Court of Appeals can redetermine facts found by the jury. . . . For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'"

See also *e.g., Moore v. Guthrie Hospital, Inc.,* 403 F.2d 366 (4th Cir. 1968); *Arkwright Mutual Insurance Co. v. Philadelphia Electric Co., supra,* 427 F.2d at 1275; *Powers v. Continental Casualty Co., supra,* and many others. Indeed, it was recently said in *Gonzales v. Missouri Pacific R.R. Co.,* 511 F.2d 629, 633 (5th Cir. 1975), that the Seventh Amendment "mandates" the

appellate court to search for a view of the case that would justify upholding the jury's verdict (as in the case at bar, a special verdict), citing this Court's decision in *Atlantic & Gulf Stevedores, Inc., supra.*

CONCLUSION

The writ of certiorari should be granted.

New York, N.Y.
June 14, 1977

Respectfully submitted,

s/ Mervin Rosenman
Attorney for Petitioner

Simon J. Hauser
Of Counsel

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 674—September Term, 1976.

(Argued February 14, 1977 Decided March 23, 1977.)

Docket No. 76-7479

A. E. HOTCHNER,

Plaintiff-Appellee,

—v—

JOSE LUIS CASTILLO-PUCHE,

Defendant,

—and—

DOUBLEDAY & COMPANY, INC.,

Defendant-Appellant.

Before:

LUMBARD and TIMBERS, *Circuit Judges,*
and WYATT, *District Judge.**

Appeal from judgment for libel and invasion of privacy entered by Judge Brieant in the Southern District on a jury verdict.

Reversed.

* Sitting by designation.

MERVIN ROSENMAN, New York, N.Y. (Simon J. Hauser, New York, N.Y., on the brief), *for Plaintiff-Appellee.*

ROBERT M. CALLAGY, New York, N.Y. (Satterlee & Stephens, James F. Dwyer and James F. Rittinger, New York, N.Y., on the brief), *for Defendant-Appellant.*

HENRY R. KAUFMAN, New York, N.Y., on the brief, *for Amicus Curiae, Association of American Publishers, Inc.*

LUMBARD, *Circuit Judge:*

Doubleday & Company, Inc. appeals from a judgment of $1 compensatory damages and $125,000 punitive damages for libel and invasion of privacy entered by Judge Brieant on a jury verdict after a one-week trial in April 1976 in the Southern District. The plaintiff is A. E. Hotchner, a successful writer and lecturer who was a friend of Ernest Hemingway's and published a memoir about him, *Papa Hemingway*, in 1965. The suit involves unfavorable remarks about Hotchner made in *Hemingway in Spain*, an English translation of personal reminiscences by a Spanish writer Jose Luis Castillo-Puche, which was published by Doubleday in 1974.

The district court determined that for first amendment purposes Hotchner in his relationship with Hemingway was a public figure.[1] Liability must therefore rest on clear and convincing proof that the defendant published with knowledge of falsity or with reckless disregard for truth.

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1 *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041, 1043-47 (S.D.N.Y. 1975). Hemingway has been acclaimed as one of the greatest American authors. He won the Pulitzer Prize for his *The Old Man and the Sea* in 1953 and the Nobel Prize for Literature in 1954.

Because the evidence on this issue is inadequate to support the jury's verdict, we reverse with instructions that plaintiff's amended complaint be dismissed.

Castillo-Puche's *Hemingway: Entre la Vida y la Muerte* was published by Ediciones Destino in Spain in 1967. The book collects in 388 pages the author's impressions of Hemingway which were garnered in Spain and Cuba in the late 1950's. It makes roughly twenty references to Hotchner, who was a travelling companion of Hemingway's in Spain.

At trial, a professor of Spanish who had written her Ph.D. thesis on Castillo-Puche testified that he had written a number of novels, earning several literary awards and establishing himself as "an important novelist." She also described Ediciones Destino as a "very prestigious" publisher. A journalist employed by a major Spanish newspaper testified that Castillo-Puche was "one of the most important reporters in Spain."

Doubleday editor Kathryn B. Medina testified that she first became interested in the book after it was favorably mentioned in the *Saturday Review* in 1969. She asked two experienced literary critics to read the Spanish version, and both returned with positive reports on it. Doubleday proceeded to acquire the English-language rights to the book from Ediciones Destino and to engage an experienced translator, Helen Lane, for the translation.

In editing Lane's translation, Medina noticed that the book contained very uncomplimentary references to Hotchner. She had the passages reviewed by William Austin, a member of the Doubleday contracts department, and between them they agreed that some eleven statements should be eliminated or toned down.[2] Medina relayed this

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2 In his memo to Medina recommending changes, Austin wrote:

> When looked at together these statements certainly ridicule Hotchner and impugn his reputation and character. As he seems

proposal to Castillo-Puche by letter. He vouched for the statements but accepted the suggested modifications.[3]

As published in 1974, the translation contained six passages which the jury ultimately found to be libellous. In five of these Castillo-Puche describes Hotchner as a manipulator, a "toady," a "hypocrite" who exhibited "two-faced behavior" toward Hemingway's true friends and "put up a very good front as [Hemingway's] mild-mannered, obedient servant," an "exploiter of [Hemingway's] reputation" who was "never open and above board." The sixth passage is one in which Hemingway, referring to Hotchner, tells Castillo-Puche: "I don't really trust him, though."

At trial, Hotchner testified at length regarding his close friendship with Hemingway. He produced letters from Hemingway containing expressions of appreciation and devotion. Three other members of Hemingway's circle testified that Hemingway had the greatest respect and affection for Hotchner.

Hotchner also testified that he never met Castillo-Puche. Hotchner knew no Spanish; Castillo-Puche knew no English. Hotchner and another member of Hemingway's entourage in Spain, Annie Davis, testified that at many of the occasions described in the book Castillo-Puche had not been present. They said that Castillo-Puche could have

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to be an author who has worked in movies and TV, this could be a serious matter.

To make matters worse I doubt whether any of these statements can be substantiated in any way.

From reading the pages you sent, this treatment borders on "malice", which together with "reckless disregard for the truth", is a prime element in any libel action.

3 The manuscript was later read by a Doubleday copy editor checking for intrinsic errors. He found no internal inconsistencies such as might call into question any of Castillo-Puche's allegations concerning Hotchner.

been among the hordes of people who had brief contact with Hemingway in a bar in Pamplona during the bullfighting festival in 1959. Hemingway's widow and daughter-in-law, testifying on behalf of Doubleday, said that Castillo-Puche had been a friend of Hemingway's and had been present with Hemingway and his companions on a number of occasions. Also introduced at trial were the Spanish and English editions of Castillo-Puche's book; these contain a number of photographs of Castillo-Puche with Hemingway and, on at least one occasion, with Hotchner and Hemingway.

On the libel count, the jury returned answers to written interrogatories regarding nineteen alleged libels. It found that all the elements of liability had been proved against Doubleday in six instances. The jury also returned answers to written interrogatories on the invasion of privacy count, finding that Doubleday had knowingly portrayed Hotchner in a false light or as a participant in fictionalized events or conversations. The jury found Hotchner entitled to recover $1 on each count as compensatory damages and $125,000 as punitive damages. On July 30, 1976, Judge Brieant denied Doubleday's motion for judgment n.o.v. or remittitur.[4] On September 1, judgment was entered in favor of Hotchner for $125,002, with costs to be taxed. This appeal by Doubleday followed.

When a public figure sues for defamation, the first amendment bars recovery unless the defamatory falsehoods were made with knowledge of falsity or with reckless disregard for the truth. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 162-65 (1967) (opinion of Warren, *C.J.*); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80

4 Judge Brieant granted Castillo-Puche's motion that the action against him be dismissed for want of personal jurisdiction.

(1964). The same standard applies if the public figure sues for invasion of privacy. *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 249 (1974); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967). The proof must be "clear and convincing"; a mere preponderance of the evidence is not enough. *Gertz* v. *Robert Welch, Inc.*, supra at 342; see *New York Times Co.* v. *Sullivan*, supra at 285-86. "[R]eckless disregard of the truth [means] subjective awareness of probable falsity: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *Gertz* v. *Robert Welch, Inc.*, supra at 335 n.6, quoting *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). Mere negligence is not actionable.

These strict tests may sometimes yield harsh results. Individuals who are defamed may be left without compensation. But excessive self-censorship by publishing houses would be a more dangerous evil. Protection and encouragement of writing and publishing, however controversial, is of prime importance to the enjoyment of first amendment freedoms. Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech. Such adequate safeguards for free speech inevitably result in reduced protection against printed statements which otherwise would be held to be libellous. To ensure that proper weight has been given to the protection of first amendment rights, it is important that the court make "an independent examination of the whole record" in scrutinizing a jury finding of scienter in a libel case. *Buckley* v. *Littell*, 539 F.2d 882, 888 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3489 (U.S. Jan. 17, 1977).

An assertion that cannot be proved false cannot be held libellous. A writer cannot be sued for simply expressing

his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be. See *Gertz* v. *Robert Welch, Inc.*, supra at 339-40; *Buckley* v. *Littell*, supra at 893. Thus, Castillo-Puche's characterizations of Hotcher cannot, if viewed in isolation, constitute actionable libel.

Liability for libel may attach, however, when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader. If an author represents that he has private, first-hand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact. In this case, the jury could reasonably have found that, contrary to the impression of intimacy conveyed by his book, Castillo-Puche's actual contact with and first-hand knowledge about Hotchner was virtually nil.

Opinions based on false facts are actionable only against a defendant who had knowledge of the falsity or probable falsity of the underlying facts. See *Kapiloff* v. *Dunn*, 27 Md. App. 514, 343 A.2d 251, 263 (1975), cert. denied, 426 U.S. 907 (1976). Doubleday had no cause for serious doubts on this score. Several photographs of Castillo-Puche with Hemingway and at least one with Hotchner and Hemingway, the reputations of Castillo-Puche and of his Spanish publisher, and the book itself all seemed to indicate that Castillo-Puche's opinions of Hotchner were based on personal observations. Castillo-Puche's allegations were not of such an extraordinary nature as would suggest a high probability of falsity; he made no claims that Hotchner had engaged in any unusual or outlandish conduct. While Castillo-Puche's denunciations of Hotchner were sufficient to put Doubleday on notice of Castillo-Puche's animosity toward Hotchner, there was no reason to believe that Castillo-Puche had never really observed

Hotchner. Knowledge of an author's ill-will does not by itself prove knowledge of probable falsity. Cf. *Goldwater* v. *Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969). Thus, the evidence does not demonstrate that Doubleday had cause seriously to suspect that Castillo-Puche's opinions of Hotchner were without foundation. Doubleday's failure to conduct an elaborate independent investigation did not constitute reckless disregard for truth. Cf. *St. Amant* v. *Thompson*, supra at 733; *New York Times Co.* v. *Sullivan*, supra at 287-88.

As for the sixth alleged libel, the statement about Hotchner purportedly made to Castillo-Puche by Hemingway, the record does not support a conclusion that Doubleday published with serious doubts about the authenticity of Castillo-Puche's version. As originally translated, Hemingway's words were: "[Hotchner is] dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him." There was no clear and convincing evidence that Doubleday knew or even suspected that this conversation was a fabrication. From Hotchner's own *Papa Hemingway*, Doubleday could have inferred that Hemingway had affection and respect for Hotchner, but no means were readily available for verifying or discrediting Castillo-Puche's account. The incident itself is believable and, as all the witnesses at trial agreed, the language used and sentiments expressed were not uncharacteristic of Hemingway. Doubleday's editor did confirm with Castillo-Puche that he stood by his account of the incident. Where a passage is incapable of independent verification, and where there are no convincing indicia of unreliability, publication of the passage cannot constitute reckless disregard for truth.

Appellee contends that Doubleday should be liable simply because it knowingly published a bowdlerized version of Hemingway's alleged statement. We disagree. It is true

that in transforming Hemingway's words to the much milder "I don't trust him," Doubleday was fictionalizing to some extent. However, the change did not increase the defamatory impact or alter the substantive content of Hemingway's statement about Hotchner. If Doubleday could not have been liable for publishing the uncut version, it cannot be liable for deciding to make the passage less offensive to Hotchner.

Thus, there was no evidence from which the jury might reasonably have found that the defendant published the alleged libels with knowledge of falsity or reckless disregard for truth. The judgment is reversed; we remand to the district court for entry of judgment dismissing the amended complaint.

MEMORANDUM OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 5516-CLB

A. E. HOTCHNER,

Plaintiff,

-against-

JOSE LUIS CASTILLO-PUCHE and DOUBLEDAY & COMPANY, INC.,

Defendants.

DOUBLEDAY & COMPANY, INC.,

Defendant and Third-Party Plaintiff,

-against-

EDICIONES DESTINO S. L.,

Third-Party Defendant.

Brieant, J.

On April 30, 1976, a jury submitted its Special and General Verdict in this action brought under New York law to recover damages for (1) libel and defamation, and (2) invasion of privacy. The jury found for plaintiff A. E. Hotchner on both claims pleaded. and made a non-cumulative award on each claim, of $1.00 compensatory damages, and $125,000.00 in punitive damages. Familiarity with the findings of the Special Verdict is assumed.

Memorandum Opinion of the District Court

Entry of a judgment was deferred pending (1) motion by defendant Doubleday & Company, Inc. for judgment n.o.v. pursuant to Rule 50(b), F.R.Civ.P., or alternatively, pursuant to Rule 59(a), for a new trial on general grounds, and also excessiveness; (2) motion by plaintiff that the Court treat the trial record as an inquest and enter judgment against the defaulting co-defendant, Jose Luis Castillo-Puche ("Puche"); (3) motion by Puche to be relieved of his default and to dismiss the action as against him for want of personal jurisdiction; (4) resolution of the issues presented by the third-party complaint.

Doubleday's Motion

Most of the points raised in Doubleday's motion require little consideration. We rely on the trial record. At least insofar as the question of liability is concerned, we think the proof more than adequate to support the detailed and carefully considered special findings of our attentive and diligent jury. Our jury could and did find, as to those of Hotchner's claims which it found actionable, that clear and convincing evidence showed Doubleday published with reckless disregard for their truth or falsity. Indeed, for the most part this clear and convincing evidence is documentary and comes from Doubleday's files, or was in possession of persons whose knowledge the jury could reasonably impute to Doubleday.

Even in a defamation case, involving as it does, the requirement that "actual malice" be proved by "clear and convincing evidence," a standard higher than the ordinary civil action but less than that of a criminal trial, every fair intendment should be given to a jury verdict. The Special Verdict shows intrinsically that our jury deliberated carefully, and made distinct and discerning determinations of fact, as the Constitution contemplates. More than a mere disagreement with or dislike for the result must be shown for us to disturb it.

Memorandum Opinion of the District Court

The question of the amount of damages bears further discussion.

Apparently, the life style and experiences of Ernest Hemingway, and his classic works of fiction remain a matter of great interest to students and the public generally. He seems to be regarded as a latter day Kipling, whose India is Spain. Why the life of this rich libertine and destroyer of wildlife should be of such great and continuing public interest a decade following his suicide, we cannot, and need not say.

Hotchner, as a result of his association with Hemingway, and his status as friend and confidante has achieved great personal fame and financial success. He has earned large sums of money, first as an adapter of Hemingway's fiction for motion pictures and television, and later as author of a best selling book recounting biographical anecdotes and his own experiences with Hemingway, entitled "Papa Hemingway," published before Puche's book. He has lectured on the subject, appeared on radio and television, and has since written a similar book about "Doris Day," a show-business personality, which was on the non-fiction bestseller lists at the time of trial.

The Puche book attacks his worth and status as an authority on Hemingway. That it did so was clear to Doubleday prior to publication. See, *inter alia,* Exhibits 7, 9, and 11.

Our jury perceived, correctly, that Hotchner had no direct financial loss due to the libel. He proved no lost employment or revenue directly flowing therefrom. His reputation as a Hemingway savant, an asset from which he has earned much money, is tarnished somewhat, and continues so, because 891 copies of Puche's libelous book "Hemingway in Spain" are lodged in the reference shelves of libraries and colleges. During a radio interview in Pittsburgh, Hotchner was taxed for being a charlatan as to his relationship with Hemingway, by a student

caller who quoted from and relied on defendant's book. To this extent, his capacity and status is damaged, and the award of some compensatory damages therefor would not have been unreasonable. Also, clearly Hotchner's on our jury's version of the facts was entitled to some damages for humiliation and mental anguish. In weighing whether the punitive damages are excessive, we may also consider that the compensatory damages are inadequate. Undoubtedly our jury intended the punitive award to do double duty, and salve his humiliated amour-propre.

As guardians of the community conscience our jurors fixed the amount of damages. The totality of their actions is not unreasonable. Doubleday, a prominent publisher with a full staff and active list can hardly be compared with the impecunious theologian as to whom an award was reduced in *Buckley v. Littell,* Dkt. 75-7358 (2d Cir. June 30, 1976). As smart money here, the amount is not excessive for this defendant.

Also, it is no windfall for this plaintiff who must pay income taxes thereon, as well as substantial legal fees, the full magnitude of which is not yet known. If we regard the social purpose of libel litigation as vindication, Hotchner's road to vindication was tortuous, costly and beset with travail. This is not a case like *Buckley, supra,* in which the publisher attempted to withdraw the offending work. Here there was no apology—indeed, instead of apologising, conceding Puche's falsity and litigating only the question of its own reckless disregard before the jury, Doubleday here hotly contested Hotchner's proof of falsity. On several occasions its efforts to do so led it to sponsor evidence or witnesses such as Valerie and Mary Hemingway which was counterproductive.

One more point requires discussion with respect to Doubleday's motion. The *Buckley* case, *supra,* was decided by our Court of Appeals after we had instructed the jury in this

case. We find nothing therein which requires a new trial here. *Buckley* holds (p. 4608):

> "The law of defamation has in effect been rewritten in the light of the constitutional imperatives.[3] [3. *See* Eaton, *The American Law of Defamation Through Gertz v. Welch, Inc. and Beyond: An Analytical Primer,* 61 Va. L. Rev. 1349, 1364, et seq. (1975); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.,* 54 U. Tex. L. Rev. 199 (1976). For one of the early recognitions of the transmutation of the law of defamation into a subject of constitutional imperatives *see* Kalvan, *The New York Times Case: A Note on the Central Meaning of the First Amendment,* 1964, S. Ct. Rev. 191.
>
> The district court, unfortunately, did not approach the task of interpreting the debatable meaning of the alleged libels in the light of the imperatives of 'uninhibited, robust, and wide-open' debate, *New York Times Co. v. Sullivan,* 376 U.S. 254, 271 (1964), but only discussed their implications once its search for the 'proper interpretation' of [the libelous Work] had ended. 393 F.Supp. at 925, 931, 942.] *See* Restatement (Second) of Torts, Special Note at 3 (Tent. Draft No. 21, 1975)."

We doubt the foregoing was intended to be construed literally. The Supreme Court does not impose or interpret the law of defamation; the states do. All that the Supreme Court has purported to do is set constitutional limits, unfortunately shifting ones, found mostly in dicta, beyond which a state is prevented by the Constitution from applying its own substantive

law. *Cf. Rosenbloom v. Metromedia, Inc.*, 403 U.S. 529 (1971); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *Time Inc. v. Firestone*, 44 U.S.L.W. 4262 (1976).

New York's state legislature could consign the libel action to that historical dustbin in which it has placed civil actions for criminal conversation, seduction, alienation of affections and breach of promise of marriage [§80-a New York Civil Rights Law, as enacted originally in Ch. 263 L. 1935]. Until it does so, the rule of *Mencher v. Chesley*, 297 N.Y. 94, (1947), and the other traditional rules retain their full force in this diversity case, subject only to the most recent applicable Supreme Court ruling on the Constitutional limitations. The only rulings of the latter sort which are relevant here are that as to a public figure, one additional element, solely federal, infelicitously described as "actual malice" must be present in the state tort, and it must be found to be so by a special standard or level of proof, "clear and convincing evidence," as was charged here.

Doubleday's motion is denied in all respects.

Castillo-Puche's Motion

Jose Luis Castillo-Puche was served with our process personally in Spain where he resides. He is a Spanish subject. He defaulted, but after the trial had begun, the record of which the Court intended to treat as an inquest, the attorneys for the Spanish Consul appeared specially for him, to vacate service.

In effecting service, plaintiff relied on §302 New York Civil Practice Law and Rules, applicable here under Rule 4(d)(7) and 4(f), and *Legros v. Irving*, 38 A.D.2d 53 (1st Dept. 1971), and its progeny.

These cases are distinguishable. Here, Doubleday acquired the defamatory work from Ediciones Destino, S.L., not from

Puche. On the entire trial record, Puche's presence and his activities in New York were minimal. His correspondence with Doubleday from Spain consenting to revisions, and his visit to its New York office, correctly styled as a mere courtesy call in the affidavit of Kathryn B. Medina, sworn to May 27, 1976, do not rise to the level of "doing business" in New York under §302(1), CPLR. In the other subsections of §302, actions for defamation are specifically excluded.

The Third-Party Complaint

The Court regards this pleading as abandoned and it is dismissed without prejudice.

Conclusion

The Clerk of the Court, pursuant to Rule 58, F.R.Civ.P. shall enter judgment in favor of plaintiff against defendant Doubleday & Company, Inc. for the sum of $125,002.00 and taxable costs, and that the complaint is dismissed without prejudice as to defendant Jose Luis Castillo-Puche for want of personal jurisdiction over that defendant, and that the Third-Party Complaint is dismissed without prejudice.

So Ordered.

Dated: New York, New York
July 30, 1976

CHARLES L. BRIEANT
CHARLES L. BRIEANT
U. S. D. J.